A

DR MEER AHMAD MYDIN MEERA

v.

PUBLIC SERVICES COMMISSION MALAYSIA & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN JCA
[ORIGINATING SUMMONS NO: S4(S5)-21-72-2007]
18 NOVEMBER 2009

C

EMPLOYMENT: *Contract of service - Termination of services - Notice of termination issued by second defendant although plaintiff's contract of service was with first defendant - Whether contractual right to terminate service lawfully delegated to second defendant - Plaintiff not given opportunity to show cause why his services should not be terminated -*

D

Whether law requires plaintiff be given a hearing before termination - Rules of natural justice could not be invoked - Termination of services was in accordance with agreement

CONSTITUTIONAL LAW: *Public servants - Termination of service -*

E

Whether termination was in fact a dismissal - Whether it contravened art. 135(2) Federal Constitution - Contractual termination not synonymous with dismissal - Article 135(2) not applicable to contract officer whose terms and conditions are governed by agreement entered into

F

The plaintiff was employed by the Government of Malaysia, the third defendant, as a specialist medical officer on grade U47 in the Ministry of Health pursuant to an agreement for a contract of service ('the agreement') for a period of two years, commencing from 1 July 2005. The agreement was signed by the secretary of the Public Services Commission Malaysia, the first defendant, on behalf

G

of the third defendant, and by the plaintiff. It was mutually agreed between the parties by cl. 9 of the agreement and the schedule thereto, *inter alia*, that the Government of Malaysia could at any time terminate the agreement by giving thirty days' written notice of such termination to the plaintiff without assigning any reasons

H

therefor. On 16 June 2006, the secretary-general of the Ministry of Health, the second defendant, invoked cl. 9 of the agreement and issued a notice terminating the plaintiff's services with effect from 1 August 2006. The plaintiff filed this originating summons seeking reliefs largely declaratory in nature, that his termination of service

I

was null and void and of no effect. The crux of the plaintiff's challenge of the termination of his services was that it was unlawful

as he was never given an opportunity to show cause why his services should not be terminated. No enquiry or investigation was held, and neither were disciplinary proceedings against him taken nor was any show-cause letter issued to him by the defendants prior to the termination of his services. He further contended that as his services were not terminated in accordance with cl. 8 of the agreement such termination was bad and he was therefore entitled to all emoluments due for the remaining period of his contract of service. The plaintiff also contended that the notice of termination of his services which was issued by the second defendant was bad in law as his contract of service was with the first defendant and therefore the notice of termination of his services should have emanated from the first defendant. In the course of plaintiff's counsel's submission, reference was made to an internal memorandum of the second defendant proposing that the plaintiff's services be terminated as he was suffering from a critical mental illness and making two recommendations; first to transfer him to another department and second, to terminate his services on grounds he failed to carry out his duties under cl. 5(ii) of the agreement. The plaintiff further argued that although the first defendant was given the power to appoint the plaintiff to his position in the public service, no power was given to dismiss him and therefore recourse should have been had to art. 135(2) of the Federal Constitution for such purpose.

Held (dismissing the plaintiff's application with costs):

(1) The plaintiff was a contract officer designated as "pegawai perubatan pakar gred U47" (specialist medical officer grade U47) in the "pengurusan dan professional" (managerial and professional) category of officers employed in the public service. Service Circular No: 2 of 2003, particularly paragraph 5.9 and annexure D, enabled the second defendant to terminate the services of a contract officer pursuant to a delegation of that power to him. The second defendant had the contractual right, which was lawfully delegated to him, to terminate the services of the plaintiff under cl. 9 of the agreement and was clearly empowered to do so. The plaintiff, having agreed to the terms of the agreement, was in no position to further insist that the second defendant should have acted under cl. 8 of the agreement before proceeding to terminate his services by notice in writing. The agreement gave the employer of the plaintiff the

right to choose the provision of the agreement it wished to act under in terminating the services of the plaintiff. (paras 38 & 42)

(2) The plaintiff, who was employed under a contract of service terminable by written notice without being entitled to be furnished with the reasons for such termination, was in no position to insist that he should be heard before his services were terminated. The law does not require he be given a hearing before such termination. The rules of natural justice could not be invoked to require the plaintiff to show cause why his services should not be terminated before they were actually terminated. Furthermore, the termination of his contract of service did not involve any element of dismissal as it was done in accordance with cl. 9 of the agreement whereby the Government was not required to give any reasons to the plaintiff as to why his services were being terminated. The terms of employment of the plaintiff were strictly contractual as he was a contract officer and the termination of his services was in accordance with the agreement. *Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (dist); *Tan Tek Seng v. Suruhanjaya Perkhidmatan Awam & Anor* (dist); *Nik Omar Nik Man v. Bank Simpanan Nasional* (dist); *Gnanasundram v. Public Services Commission* (foll). (paras 39-41 & 43-46)

(3) The court disagrees with the plaintiff's argument that as no power to dismiss the plaintiff had been conferred on the first defendant, art. 135(2) of the Federal Constitution should have been adhered to before his services were terminated. The dismissal of a person from employment connotes some wrongdoing or an element of moral turpitude on his part which results in his dismissal. Termination of a person's services under a contract of service has no such connotation and such exercise is the simple act of exercising a contractual right involving no wrongdoing or any element of moral turpitude on the part of the person whose services are terminated. Since the plaintiff was not dismissed, art. 135(2) cannot be invoked in his case. At any rate, that article cannot apply to a contract officer whose terms and conditions of employment are governed by the agreement that he entered into. *Gnanasundram v. Public Services Commission* (foll). (paras 47 & 48)

(4) As for the plaintiff's contention that the first defendant only had the power to appoint the plaintiff to the public service but not to dismiss him, s. 47 of the Interpretation Acts 1948 and 1967 provides that where a power to make an appointment is conferred by any written law, the appointing authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, re-appoint or reinstate any person appointed in the exercise of the power. Therefore the first defendant, and the second defendant acting under a delegated power, certainly had the right to remove the plaintiff from his appointment by the termination of his services as provided in the agreement. (paras 49-50)

(5) Even if it was true that the defendants at one time contemplated transferring the plaintiff to another department, as contended on behalf of the plaintiff, this did not preclude them from subsequently exercising their contractual rights under cl. 9 of the agreement. The question of whether the defendants acted *mala fide*, as alleged by the plaintiff, in terminating his services under cl. 9 of the agreement, despite contemplating transferring him to another department, became irrelevant when cl. 9 of the agreement was invoked. The defendants acted within their rights when they invoked that clause to terminate the services of the plaintiff. Accordingly the plaintiff's claim was dismissed with costs. (para 51)

Case(s) referred to:

Gnanasundram v. Public Services Commission [1966] 1 LNS 219 ***(foll)***

Lembaga Tatatertib Perkhidmatan Awam, Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(dist)***

Nik Omar Nik Man v. Bank Simpanan Nasional [2005] 4 CLJ 66 CA ***(dist)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Awam & Anor [1996] 2 CLJ 771 CA ***(dist)***

Legislation referred to:

Federal Constitution, arts. 5(1), 8(1), 13, 132(1)(c), (2), 135(2)(a), (b), (c), (d)

Interpretation Acts 1948 and 1967, s. 47

Public Officers (Appointment, Promotion And Termination of Service) Regulations 2005, regs. 3(2), 4, 50, 55, 56, 59, 60(3)

For the plaintiff - N Vijaya; M/s KS Ranjit Gill & Partners
For the defendants - Shamsurryaty Shamsuddin SFC

Reported by Susheila Sreedharan

A

JUDGMENT

T Selventhiranathan JCA:

[1] The plaintiff was employed by the Government of Malaysia, the third defendant, as a specialist medical officer on grade U47 in the Ministry of Health pursuant to an agreement for a contract of service ('the agreement') for a period of two years, commencing from 1 July 2005. The agreement was signed by the secretary of the Public Services Commission Malaysia, the first defendant, on behalf of the third defendant, and by the plaintiff.

[2] On 16 June 2006, the secretary-general of the Ministry of Health, the second defendant, issued a notice terminating the plaintiff's services with effect from 1 August 2006 pursuant to cl. 9 of the agreement, which reads as follows:

> **Penamatan oleh Kerajaan**
>
> 9. Kerajaan boleh pada bila-bila masa memberhentikan perkhidmatan pegawai dengan memberi notis secara bertulis seperti yang diperuntukkan dalam jadual kepada perjanjian ini atau dengan membayar kepada pegawai satu bulan gaji sebagai ganti notis itu tanpa memberi apa-apa alasan.

A free English translation thereof reads:

> **Termination by the Government**
>
> 9. The Government may at any time terminate the services of the officer by giving notice in writing as provided in the schedule to this agreement or by paying to the officer one month's salary *in lieu* of notice without giving any reason therefor.

The relevant provision in the schedule to the agreement reads:

> 5. Fasal 9 dan 10 – Notis berhenti kerja: 30 hari.

A free English translation thereof reads:

> 5. Clauses 9 and 10 – Notice of termination: 30 days.

[3] By this originating summons, which was filed on 20 March 2007, the plaintiff sought the following reliefs:

(a) a declaration that the act of the defendants in terminating his services as a specialist medical officer on grade U47 in the Ministry of Health was null and void and of no effect;

(b) a declaration that the termination of the contract of service of the plaintiff was null and void and of no effect because the defendants failed to adhere to the procedure (for termination) contained in the Public Officers (Conduct and Discipline) Regulations 1993;

(c) a declaration that the termination of the contract of service of the plaintiff was null and void and of no effect in law and that the plaintiff be reinstated in the post that he held prior to the termination of his services;

(d) a declaration that the plaintiff was entitled to the salary, allowances and other benefits which he would have enjoyed had his contract of service not been terminated and that the defendants do pay him the same;

(e) damages for the termination of the services of the plaintiff, which termination was null and void and of no effect;

(f) costs;

(g) interest;

(h) any other order which the court thought to be just, fit and proper.

[4] The crux of the plaintiff's challenge of the termination of his services was that it was unlawful as he was never given an opportunity to show cause why his services should not be terminated. He further contended that his services should have been terminated in accordance with cl. 8 of the agreement, which provides as follows:

Pemberhentian oleh Kerajaan

8. Jika pegawai pada bila-bila masa cuai atau enggan atau kerana apa-apa jua sebab selain dari sebab yang disebutkan dalam fasal 7 tidak mematuhi apa-apa perintah yang diberi oleh seseorang pegawai Kerajaan yang berkuasa ke atasnya atau membocorkan apa-apa maklumat berkenaan dengan hal ehwal Kerajaan kepada sesiapa jua yang tidak berkuasa menerimanya atau dengan apa-apa jua cara berkelakuan salah atau tidak mematuhi mana-mana peruntukan perjanjian ini, Kerajaan boleh menamatkan perkhidmatannya dan apabila dia ditamatkan perkhidmatan mengikut peruntukan ini, segala hak dan faedah pegawai di bawah perjanjian ini hendaklah luput dan tamat dengan serta-merta.

A free English translation thereof reads:

Termination by the Government

8. If the officer at any time neglects or refuses or, for any cause other than the cause specified in clause 7, does not comply with any order given by an officer of the Government who has authority over him or discloses any information respecting the affairs of the Government to any unauthorised person or in any manner misconducts himself or does not comply with any of the provisions of this agreement, the Government may terminate his services and when his services are terminated in accordance with this provision, all rights and benefits of the officer under this agreement shall be terminated with immediate effect.

[5] As the plaintiff's services were terminated without recourse being first made to cl. 8 of the agreement, it was argued on his behalf that the termination was bad and he was therefore entitled to all emoluments due for the remaining period of his contract of service.

[6] It was also contended on behalf of the plaintiff that the notice of termination of his services which was issued by the second defendant was bad in law as his contract of service was with the first defendant and not with the second defendant and therefore the notice of termination of his services should have emanated from the first defendant.

[7] It was not in dispute that the notice to terminate the plaintiff's services was contained in the second defendant's letter to him dated 16 June 2006, which reads as follows:

Kementerian Kesihatan Malaysia
Bahagian Sumber Manusia
Aras 9 & 10, Blok E7, Parcel E
Pusat Pentadbiran Kerajaan Persekutuan
62590 WP Putrajaya

Our ref: Bil (28) dlmKKM-61(2077) Bhg 4
Date: 16 June 2006

Dr Meer Ahmad b Mydin Meera
Medical Officer (Specialist) Grade U47
Hospital Labuan
Wilayah Persekutuan Labuan

Through and copy to:

Director

State Health Department of
Wilayah Persekutuan Labuan
Peti Surat 80832
87018 Wilayah Persekutuan Labuan

Dear Sir

Notice To Terminate Service As Medical Officer (Specialist) Grade U47 With Ministry Of Health Malaysia

The above matter is referred.

2. With regret, this is to inform you that your services as Medical Officer (Specialist) with the Ministry will no longer be required. Therefore, your employment will be terminated pursuant to clause 9 of the employment agreement and to take effect from 1st August 2006. This decision is final and any appeal will not be entertained.

3. The Ministry takes this opportunity to thank you for the services extended and wish you well and success in your future undertaking.

Your faithfully

sgd

(Ismail bin Hussin)
Human Resource Division
For the Secretary General
Ministry of Health, Malaysia.

[8] Copies of this letter were also sent to various bodies, including the first defendant and the director-general of the Public Service Department.

[9] In arguing the case for the plaintiff, learned counsel submitted that the plaintiff was aggrieved with the decision to terminate his services as he was not given a reasonable opportunity of being heard before his services were terminated. No enquiry or investigation was held, and neither were disciplinary proceedings against him taken nor was any show-cause letter issued to him by the defendants prior to the termination of his services. Hence it was contended that the termination was "wholly unfair, unjustified, bad in law and in breach of the rules on natural justice".

[10] It was further contended on behalf of the plaintiff that "the notice of termination was bad in law and invalid for the reason that the letter of offer was issued by the first defendant whereas the termination letter was issued by the second defendant. The plaintiff was not informed at the time of the acceptance of the letter of offer by the first defendant that his services could be terminated by the second defendant. The defendants therefore acted unfairly, wrongfully and illegally towards the plaintiff by not giving him any opportunity of being heard to defend himself".

[11] In relation to the defendants' contention that the notice of termination was effected pursuant to cl. 9 of the agreement which only required the defendants to give the plaintiff thirty days' prior written notice of the termination of his services, which was done, or to pay him one month's salary *in lieu* thereof and that the defendants were not required to give any reasons as to why the plaintiff's services were terminated, it was submitted on behalf of the plaintiff that an internal memorandum of the second defendant had proposed that the services of the plaintiff be terminated on the ground that he was suffering from a critical mental illness. However, the memorandum contained two recommendations, namely, one to transfer him to another department, and the other to terminate his services on the ground that he had failed to carry out his duties under cl. 5(ii) of the agreement.

[12] In the circumstances, it was submitted that "the notice of termination was bad in law and invalid and issued in bad faith as the facts revealed that the reason that the plaintiff was terminated was allegedly because he was suffering from critical mental illness or for the reason allegedly that he had failed to carry out his duties. In none of these matters was the plaintiff given an opportunity to be heard prior to his termination".

[13] It was pointed out that both the secretary-general of the Ministry of Health and the director-general of health "would not have given their support for the recommendation made by Bahagian Sumber Manusia to terminate the plaintiff as contained in the 'Cadangan Penamatan Kontrak Pegawai Perubatan Pakar Gred U47' if not for the representation made therein by Bahagian Sumber Manusia that the plaintiff was allegedly suffering from critical mental illness or for the reason allegedly that he had failed to carry out his duties. Hence the second defendant's act of issuing the notice of termination pursuant to cl. 9 without giving any reason

was tainted with bad faith. The plaintiff must be given an opportunity to be heard on these allegations before issuing any notice of termination. In fact the plaintiff was not given any opportunity to be heard prior to his termination. Furthermore as the 'Cadangan Penamatan Kontrak' contained the other recommendation by the Ketua Pengarah Kesihatan to transfer the plaintiff to another department there arose an issue under what basis did the Human Resources Unit allege that the plaintiff was suffering from critical mental illness or that he failed to carry out his duties as required under clause 5(ii); and under what authority did they recommend that he should be terminated when the Pengarah Kesihatan Wilayah Persekutuan being his immediate superior authority recommended that he should be transferred to another department".

[14] Learned counsel for the plaintiff submitted that cl. 9 of the agreement ought not to be used arbitrarily to conceal an ulterior motive and that if the termination was in truth a dismissal, it contravened art. 135(2) of the Federal Constitution, which states as follows:

> No member of such a service (ie the public service) as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:.

[15] If, on the other hand, the termination was construed as such, "the termination was unlawful for the reason that the category of cases provided for termination under the Federal Constitution was limited to cases or situations contained in art. 135(2)(a), (b), (c) and (d). Even if the Federal Constitution implicitly provided for termination for cases other those provided for under art. 135(2)(a), (b), (c) and (d), then the combined effect of arts. 5(1) and 8(1) demanded that fairness both in procedure and in substance be adhered to on the part of the defendants before taking any action to terminate the plaintiff since the said decision being a public law decision would have an adverse effect on the plaintiff's life which included his livelihood".

[16] A further argument that was raised in the written submissions in passing was that, although the first defendant was given the power to appoint the plaintiff to his position in the public service, no power was given to dismiss him and therefore recourse should have been had to art. 135(2) of the Federal Constitution for such purpose.

[17] In advancing arguments on the applicable law, learned counsel for the plaintiff relied, among others, on the Court of Appeal decisions in the following cases:

(a) *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 CLJ 224 at p. 225 held (2) & (3);

(b) *Tan Tek Seng v. Suruhanjaya Perkhidmatan Awam & Anor* [1996] 2 CLJ 771; and

(c) *Nik Omar Nik Man v. Bank Simpanan Nasional* [2005] 4 CLJ 66 to contend that there cannot be termination of services simpliciter in the law of employment in Malaysia.

[18] The learned counsel for the plaintiff concluded in submission that "the termination was wrongful, bad in law and illegal if it was in truth a dismissal for not having complied with art. 135(2) of the Federal Constitution and in breach of the rules of natural justice and the Public Officers (Conduct and Discipline) Regulations 1993 and other relevant general orders and regulations. However, if the termination was not a dismissal but only a termination, then such termination would still be void since the termination was not one based in the public interest as required under the proviso contained immediately after paras (a), (b), (c) and (d) to art. 135 (2) (a), (b), (c) and (d). Therefore the termination was illegal and *ultra vires* the Federal Constitution".

[19] Learned counsel for the plaintiff went on to submit that even if the Federal Constitution implicitly provided for termination for cases other than in the public interest, the combined effect of arts. 5(1), 8(1) and 13 of the Federal Constitution demanded that fairness both in procedures and in substance be adhered to on the part of the defendants before taking any action to terminate prematurely the plaintiff's employment since the right of livelihood was recognized as a fundamental right protected under art. 5(1). Therefore cl. 9 of the agreement which empowered the defendants to terminate the services of the plaintiff without assigning any reason therefor or without having any lawful justification or excuse to do so was unconstitutional and consequentially invalid.

[20] Finally, it was submitted that the secretary-general of the Ministry of Health had no power to terminate the plaintiff's employment and therefore the notice of termination was void.

[21] The case for the defendants was summarized in submission as follows:

(a) the termination of the services of the plaintiff was based on cl. 9 of the agreement and not on any disciplinary action taken against him;

(b) clause 9 of the agreement provided that the Government may at any time terminate the agreement by giving written notice thereof as provided in the schedule to the agreement or by paying the plaintiff one month's salary *in lieu* of notice without assigning any reason therefor;

(c) the termination of the services of the plaintiff was not made arbitrarily in the circumstances;

(d) the termination of the services of the plaintiff was legally made through the correct channel;

(e) though the appointment of the plaintiff as an officer on contract was made by the first defendant, the termination of his services was legally made by the second defendant since such power to terminate was delegated to the second defendant *vide* Service Circular No: 2 of 2003;

(f) the plaintiff was only entitled to his monthly emoluments up to the date of the termination of his services taking effect, ie 1 August 2006; and

(g) the plaintiff would only be entitled to gratuity upon the successful completion of his term of employment and not otherwise.

[22] In further reply to the submissions on behalf of the plaintiff, learned senior federal counsel submitted that the second defendant had the power to terminate the services of the plaintiff even though the authority appointing him to the public service was the first defendant as such power to terminate the services of the plaintiff had been delegated to the second defendant under Service Circular No: 2 of 2003.

[23] Having read the submissions and heard the arguments advanced on behalf of the parties, I dismissed with costs the application of the plaintiff for the various reliefs, largely declaratory in nature, sought through the originating summons in encl. (1) for the reasons which now follow.

[24] The plaintiff was appointed as a grade U47 specialist medical officer in the general public service of Malaysia constituted under art. 132(1)(c) of the Federal Constitution pursuant to a contract of employment, ie the agreement, for a period of two years with effect from 1 July 2005. It was mutually agreed between the parties by cl. 9 of the agreement and the schedule thereto, *inter alia*, that the Government of Malaysia could at any time terminate the agreement by giving thirty days' written notice of such termination to the plaintiff without assigning any reasons therefor.

[25] The second defendant, acting on behalf of the first and third defendants, invoked cl. 9 of the agreement to terminate the services of the plaintiff prior to the expiry of the two-year term of employment of the plaintiff.

[26] The argument on behalf of the plaintiff that his services could only be terminated by the Public Services Commission (and not by the second defendant) as that was the authority which appointed him to his position could not be sustained for the reasons which I shall proceed to elaborate upon below.

[27] Article 132(2) of the Federal Constitution provides as follows:

> (2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services … may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong ...

[28] By virtue of this provision, the Yang di-Pertuan Agong made the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2005 ("the 2005 Regulations" or "these regulations" referred to interchangeably) which came into operation on 1 May 2005. These regulations therefore applied to the plaintiff whose employment commenced on 1 July 2005 and came to an end on 1 August 2006.

[29] For convenience, unless the context indicates otherwise, any reference in this judgment to a particular regulation shall mean that regulation in the 2005 Regulations.

[30] Part X of these regulations deals with the appointment of an officer, such as the plaintiff, under a contract of service. In these regulations, such an officer is referred to as a contract officer. "Officer" in reg. 4 is interpreted to mean "all categories of serving officers appointed by the Commission on permanent, temporary or contract basis;".

[31] Regulations 55 and 56 read as follows:

Appointment of a contract officer

55.Notwithstanding Part II, the Commission may appoint an officer on contract basis.

Termination of service and resignation of a contract officer

56. Subregulation 50(3) and paragraph 51(1)(a) shall apply to the termination of service and resignation, respectively, of a contract officer.

[32] Regulation 50 which is headed "Notice of termination of service" reads in subregulation (3) thereof as follows:

(3) Notwithstanding subregulation (2), for an officer appointed other than to the permanent appointment, the period of the written notice shall be:

(a) according to the terms of his appointment; or

(b) if the period is not provided for in the terms of his appointment, thirty days.

[33] Regulation 3(2) clearly distinguishes the appointment of a contract officer under Part X of these regulations from the procedures applicable in respect of permanent or temporary appointments.

[34] Regulation 3 reads as follows:

Application of the appointment procedure

3. (1) The procedures specified in these regulations for making appointments to a public service under the jurisdiction of the Commission shall apply to all permanent or temporary appointments, except for certain appointments that have been exempted by the Commission.

(2) The appointment procedure for contract officers shall be determined by the Director General of Public Service.

[35] Part XII of these regulations deals with miscellaneous matters. Regulations 59 and 60(3) provide as follows:

Power of the Director General of Public Service

59 (1) Except for power which has been delegated to him, the Director General of Public Service may, from time to time, in writing, delegate his power under these regulations to any officer.

A (2) The Director General of Public Service may, from time to time, if necessary, issue guidelines to clarify any provision in these regulations.

Savings and transitional

B 60 (3) Any guidelines issued prior to the coming into operation of these regulations shall continue to be applicable in so far as it is not contrary to any of the provisions in these regulations.

[36] The Director General of Public Service by way of Service Circular No: 2 of 2003 provided guidelines in respect of the C procedures for the appointment of a contract officer and for the termination of his services. By virtue of the provisions of reg. 60(3) reproduced above, the guidelines continue to be applicable. Paragraph 5.9 of Service Circular No: 2 of 2003 provides that the services of a contract officer may be terminated by an officer listed D in annexure D thereto. Paragraph 5.9 reads:

Penamatan Kontrak

5.9 Kontrak seseorang pegawai boleh dipendekkan atau ditamatkan oleh pegawai yang diberi kuasa di ruangan pertama lampiran D atau E oleh pegawai itu sendiri mengikut peruntukan dalam perjanjian kontrak atau peraturan lain yang dikuatkuasakan dari semasa ke semasa.

A free English translation thereof reads:

F **Termination of Contract**

5.9 The contract of an officer may be shortened or terminated by the officer who is given the power to do so in the first column of annexure D or by the officer himself in accordance with the G provisions in the contractual agreement or other regulations which are in force from time to time.

[37] Annexure D to Service Circular No: 2 of 2003 provides the list of officers empowered to terminate the services of a contract officer according to the grade of the latter officer and, particularly H in this case, paragraph (iv) of annexure D is applicable. It provides:

I

Lampiran D

Kuasa Menamatkan Perkhidmatan Pegawai Kontrak

Ruangan Pertama	Ruangan Kedua
(iv) Ketua Setiausaha Kementerian (di Jabatan Perdana Menteri kuasa diberi kepada Timbalan Ketua Setiausaha)	Pegawai Kontrak Kumpulan Pengurusan dan Professional di Kementerian dan Jabatan-jabatan di bawahnya

A free English translation thereof reads:

Power To Terminate Services Of Contract Officer

First Column	Second Column
(iv) Secretary General of the Ministry (in the Prime Minister's Department this power is given to the Deputy Secretary General)	Contract officer in the Managerial and Professional Group in the Ministry and in departments under it

[38] The plaintiff was a contract officer designated as "pegawai perubatan pakar gred U47" (specialist medical officer grade U47) in the "pengurusan dan professional" (managerial and professional) category of officers employed in the public service. Service Circular No: 2 of 2003, particularly paragraph 5.9 and annexure D, enable the secretary-general of the Ministry of Health (the second defendant) to terminate the services of a contract officer pursuant to a delegation of that power to him. Hence the second defendant was clearly empowered to terminate the services of the plaintiff.

[39] The plaintiff's counsel's contention that the three decisions of the Court of Appeal adverted to earlier were applicable is, with respect, not sustainable. Those cases are distinguishable on the facts as the persons concerned in those cases were not employed under a contract of service unlike the plaintiff in the present case.

[40] Additionally, the decision in *Utra Badi (supra)* was reversed by the Federal Court on appeal whereby it was held that even a public officer in permanent service does not have a right to be heard in mitigation before any punishment is imposed on him pursuant to disciplinary action being taken against him.

[41] In the circumstances, the plaintiff in the present case who was employed under a contract of service, terminable by written notice without being entitled to be furnished with the reasons for such termination, was in no position to insist that he should be heard before his services were terminated. The law does not require he be given a hearing before such termination.

[42] In the present case, the second defendant had the contractual right, which was lawfully delegated to him, to terminate the services of the plaintiff under cl. 9 of the agreement. The plaintiff, having agreed to the terms of the agreement, was in no position to further insist that the second defendant should have acted under cl. 8 of the agreement before proceeding to terminate his services by notice in writing. The agreement gave the employer of the plaintiff the right to choose the provision of the agreement it wished to act under in terminating the services of the plaintiff.

[43] An officer in the public service who is employed under a contract of service must look to the terms of the contract to determine his rights and liabilities in relation to the termination of his services. The rules and regulations which are generally applicable to other officers in the public service are only applicable to an officer employed under a contract of service where they are specifically made applicable to him and he is no position to demand that the rules and regulations which are applicable only to other officers in the public service should be extended and made applicable to him.

[44] The position of a person employed under a contract of service in the public service is akin to that of an officer employed on a temporary basis in the public service. In *Gnanasundram v. Public Services Commission* [1966] 1 LNS 219, the applicant in that case sought leave to apply for an order of *certiorari* to quash the decision of the Public Services Commission terminating his appointment as a temporary enforcement officer in the road transport department. In the alternative, he sought leave for enlargement of time to make the application.

[45] Delivering his judgment in that case, Raja Azlan Shah J (as His Royal Highness the Sultan of Perak then was) had this to say:

… Secondly, it was contended that the applicant's relationship with the Government is not one of contract and therefore the letter dated 4th August 1964, purporting to terminate his service by the payment of one month's salary *in lieu* of notice is an error in law on the face of the record. In my view, a Government, like any other employer, is not fettered to enter into special contracts of employment with temporary employees. I am encouraged in that view by a passage in the persuasive judgment of the Supreme Court of India in *Satish Chandra Anand v. The Union of India* AIR [1953] SC 250 at page 252:

> But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer.

In the light of the facts presented by the applicant, the offer made by the Public Services Commission was in respect of temporary employment and clause 2(d) specifically states that during the rest of the period of employment, that is to say after the first year of employment, the appropriate notice required by both parties would be three months' or one month's salary *in lieu* thereof plus cost of living allowance. The applicant accepted those terms and entered into a contract with the Government. He was thus bound by those terms in the same way as the Government was bound. In the circumstances I see no escape from the conclusion that the present case is sufficiently analogous to a contractual relationship. Thirdly, it was contended that by virtue of Article 132(2A) of the Federal Constitution the applicant holds office during the pleasure of the Yang di-Pertuan Agong and therefore he cannot be dismissed unless he was given a reasonable opportunity of being heard: see Article 135(2) of the Federal Constitution.

Without deciding whether the applicant holds office during pleasure, I am clearly of the opinion that Article 135(2) does not apply. The applicant was never dismissed from service. Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations 1956. That is not the present position

A here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used.

B **[46]** Similarly, in the present case, I was of the view that the rules of natural justice could not be invoked to require the plaintiff to show cause why his services should not be terminated before they were actually terminated. Furthermore, the termination of his contract of service did not involve any element of dismissal as it was done in accordance with cl. 9 of the agreement whereby the C Government was not required to give any reasons to the plaintiff as to why his services were being terminated. The terms of employment of the plaintiff were strictly contractual as he was a contract officer and the termination of his services was in accordance with the agreement.

D

[47] It will be remembered that an argument had also been raised on behalf of the plaintiff that as no power to dismiss the plaintiff had been conferred on the first defendant, art. 135(2) of the Federal Constitution should have been adhered to before his services were E terminated.

[48] Learned counsel for the plaintiff seemed to take the approach in this context that dismissal and contractual termination of services are synonymous. With respect, I cannot agree. The dismissal of a F person from employment connotes some wrongdoing or an element of moral turpitude on his part which results in his dismissal. Termination of a person's services under a contract of service has no such connotation and such exercise is the simple act of exercising a contractual right involving no wrongdoing or any G element or moral turpitude on the part of the person whose services are terminated. Since the plaintiff was not dismissed, art. 135(2) cannot be invoked in his case. At any rate, that article cannot apply to a contract officer whose terms and conditions of employment are governed by the agreement that he entered into.

H

[49] As for the contention that the first defendant only had the power to appoint the plaintiff to the public service but not to dismiss him (the word "dismiss" being used interchangeably with the word "terminate" on behalf of the plaintiff), the answer lies in I s. 47 of the Interpretation Acts 1948 and 1967, which reads as follows:

Power to appoint includes power to remove, etc

47. Where a power to make an appointment is conferred by any written law, the appointing authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or re-instate any person appointed in the exercise of the power.

[50] Therefore the first defendant, and the second defendant acting under a delegated power, certainly had the right to remove the plaintiff from his appointment by the termination of his services as provided in the agreement.

[51] Even if it was true that the defendants at one time contemplated transferring the plaintiff to another department, as contended on behalf of the plaintiff, this did not preclude them from subsequently exercising their contractual rights under cl. 9 of the agreement. The question of whether the defendants acted *mala fide,* as alleged by the plaintiff, in terminating his services under cl. 9 of the agreement, despite contemplating transferring him to another department, became irrelevant when cl. 9 of the agreement was invoked. The defendants acted within their rights when they invoked that clause to terminate the services of the plaintiff.

[52] For all the foregoing reasons I dismissed the plaintiff's claim with costs.